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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JAMES LAVERN HESS III, Defendant and Appellant.	B212089 (Los Angeles County Super. Ct. No. NA077278)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charles D. Sheldon, Judge. Affirmed as modified with directions.

Cristina G. Lechman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E. Winters and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant James Lavern Hess III appeals from a judgment of conviction entered after a jury trial. The jury found defendant guilty of attempted grand theft of personal property (Pen. Code,[1] §§ 487, subd. (a), 664; count 1) and two counts of second degree commercial burglary (§ 459; counts 2 and 3). Defendant admitted his 1994 residential burglary conviction within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12) and four prior prison terms pursuant to section 667.5, subdivision (b). The trial court sentenced defendant to six years in state prison: three years on count 1, doubled because of the prior strike, plus concurrent two-year middle term sentences on counts 2 and 3. The court struck the remaining prior prison term enhancements for sentencing purposes.

On appeal, defendant claims insufficiency of the evidence to support the attempted theft conviction on the theory presented to the jury and evidentiary errors. He also points out a number of sentencing errors. We modify and affirm the judgment of conviction. We also remand for correction of the sentencing errors.

FACTS

A. *Prosecution*

Michelle Rowe (Rowe) was employed at Money Mart, a check-cashing business in Long Beach. On January 24, 2008, defendant entered the store and presented Rowe with two checks, one for $500 and the other for $1,000. The checks were issued by Wescom Credit Union (Wescom), and Michael Login (Login) was the maker. Defendant told Rowe that the checks were issued for floor installation work. Rowe became concerned when she noticed the maker lived in an apartment, and normally the type of work

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

performed would be paid for by landlords, not tenants. Rowe was also suspicious because personal checks were more questionable than other checks and more likely to be stolen.

Rowe asked for Login's phone number, and defendant replied that he did not have it. Rowe contacted Wescom to see if it could provide a phone number. Rowe was told someone would call her back. Rowe chose not to cash the checks and told defendant that she could not get in touch with Login and defendant could come back later. Before he left, she wrote a code on both checks, "67 MK," which indicated the store number and the check as a possible evidence of a scam.

When Wescom contacted Rowe, they informed her that the check was "not okay." Rowe put a note in the store's computer system to call the police if defendant tried to cash suspicious checks.

Maira Torres (Torres) worked at another Money Mart location in Long Beach. Defendant entered the store and attempted to cash the same checks. Torres noticed the "67 MK" notation. She called the bank and verified that the account was valid and the checks were "stolen." She did not cash the checks, and the police were called.

Long Beach Police Officer Darlene Wigmore responded to the call and arrested defendant. Defendant indicated that he was cashing checks for a friend in exchange for $50 per check. He stated a friend had written the checks in front of him and had told him they were valid. He had first tried to cash the checks at Wescom and then went to the Money Marts.

Darlene Gonzalez (Gonzalez), a loan investigator for Wescom, testified that a $4,880 check was deposited to Login's account through an ATM on January 23, 2008. The check was payable to a Staporn Buasuwan. Since the usual balance in Login's account was less than $100, Gonzalez and Wescom placed the $4,880 on hold on January 25 so that the funds were not available. Gonzalez also contacted the bank that the check was drawn on and learned that the check had not come from that institution.

According to Gonzalez, when Rowe called Wescom on January 24, a Wescom representative probably would have told her the funds were not available because of the large balance change from $100 to $4,880.

B. ***Defense***

Defendant testified that on January 23, 2008, a former neighbor named Victor asked him to cash two checks for him because he lacked proper identification. The checks were filled out except for the name of the payee, and Victor wrote defendant's name when they were outside a Wescom branch location. Victor promised defendant $50 for each check he cashed. Defendant believed that Victor had performed work to receive the checks.

Defendant called Wescom and verified that the funds were available. When he presented the checks, the teller told him the funds were not available. On January 24, 2008, Victor and his girlfriend took defendant back to the Wescom location. On the way to the credit union, defendant called and was informed that the funds were available. Once again, the teller refused to cash the checks, without any explanation.

At the Money Mart, the teller refused to cash the checks and told defendant that she could not contact the maker. At another Money Mart, defendant tried to cash the checks, but was told the funds needed to be verified. While defendant was waiting in the lobby, he was arrested.

After he was arrested, defendant told Officer Wigmore that he was cashing the checks for Victor and he believed the checks were valid. He had called Wescom to verify that the funds were available. Defendant did not know Login and never attempted to contact him.

C. ***Prosecution Rebuttal***

Officer Wigmore indicated that defendant had told her that he had spoken to Login and verified that Login had made a deposit into his Wescom account and funds were

available to cash the two checks. Law enforcement was able to retrieve a phone number for Login from Victor.

DISCUSSION

A. *Sufficiency of Evidence to Support Conviction of Attempted Theft*

Defendant contends that his attempted theft should have been prosecuted as a theft by obtaining property by false pretenses and not the theory on which the jury was instructed: theft by larceny. Since the jury was not instructed on theft by false pretenses, defendant contends that his conviction must be reversed. We disagree.

Defendant concedes that the evidence was sufficient to establish attempted theft by false pretenses, and the People agree that the proper theory under which defendant should have been convicted was theft by false pretenses. We find the error to be harmless even though the defendant was convicted under the wrong theory of theft.

In reviewing the sufficiency of the evidence, the question on appeal is whether there is evidence from which a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) "In making this determination, we '"must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.]" (*People v. Rayford* (1994) 9 Cal.4th 1, 23; accord, *People v. Cuevas* (1995) 12 Cal.4th 252, 260-261.) We also must examine the entire record, not merely """"isolated bits of evidence."""" (*Cuevas, supra,* at p. 261.)

Defendant was convicted of attempted grand theft in violation of section 487, subdivision (a), which defines grand theft as theft where "the money, labor, or real or personal property taken is of a value exceeding four hundred dollars ($400) . . . ." The jury was instructed on theft by larceny, containing three elements: (1) a person took personal property of some value belonging to another; (2) he has the specific intent to permanently deprive the alleged victim; and (3) he carried the property away by

obtaining physical possession and control of it by some movement. (CALJIC No. 14.02.) The evidence at trial showed that defendant attempted to gain possession of money with the consent of the owner, Money Mart, and Money Mart intended to give defendant title to the money. The distinction between theft by trick and device and theft by false pretenses is that, where "the title still remains in the owner, larceny is established; while the crime is false pretenses, if the title, as well as the possession, is absolutely parted with." (*People v. Delbos* (1905) 146 Cal. 734, 737.)

Both parties agree that the evidence is sufficient to show that defendant committed the crime of attempted theft by false pretenses and not theft by trick and device. The parties do not agree on how to resolve the conviction on the wrong theory of theft. Defendant contends that the conviction for attempted grand theft must be reversed for insufficiency of the evidence. The People submit that the error does not require reversal and the judgment should be modified to reflect defendant's conviction of attempted theft by false pretense. We adopt the People's reasoning and reject defendant's contention.

Defendant relies primarily on *People v. Curtin* (1994) 22 Cal.App.4th 528. In *Curtin*, the defendant cashed a check made out to a depositor at the bank. The defendant presented a photographic identification card with the depositor's name and the defendant's photograph. The checking account holder testified that he had never written the check and it appeared to come from a set that he had ordered but never received. (*Id.* at p. 530.) The defendant was convicted of grand theft on a theory of larceny by trick or device. On appeal, the defendant argued that his conviction could not stand because the evidence was insufficient to establish a theft on that theory. He argued that the crime committed was theft by false pretenses. (*Id.* at pp. 530-531.)

The *Curtin* court agreed, explaining that "'[l]arceny by trick and device is the appropriation of property, the possession of which was fraudulently acquired; obtaining property by false pretenses is the fraudulent or deceitful acquisition of both title and possession.'" (*People v. Curtin, supra,* 22 Cal.App.4th at p. 531, quoting *People v. Ashley* (1954) 42 Cal.2d 246, 258.) On this basis, the court reversed defendant's conviction for grand theft by trick and device. (*Curtin, supra,* at p. 532.)

The People note that subsequent cases have questioned the holding in *Curtin*, specifically *People v. Counts* (1995) 31 Cal.App.4th 785 and *People v. Traster* (2003) 111 Cal.App.4th 1377. In *Counts*, codefendant Mikels bought lumber on credit from various companies, for a project that did not exist. Mikels then sold the lumber at half price to defendant Counts. Mikels was charged with four counts of grand theft by false pretenses while Counts was charged with three instances of receiving stolen property. A jury convicted codefendant Mikels of three counts of theft and one count of attempted theft. (*Counts*, *supra*, at pp. 787-788.)

On appeal, Mikels argued that the proper charge for one of the counts should have been theft by trick and device because the lumber company held a security interest in the lumber, negating the element of transfer of title. The court rejected this claim. The court discussed Mikels's reliance on *Curtin*. "*Curtin* reversed a theft conviction because the instruction as to larceny by trick required the presence of evidence which did not exist in the record, and there was insufficient evidence of corroboration to sustain the conviction on a theory of false pretenses." (*People v. Counts*, *supra*, 31 Cal.App.4th at p. 791.) Mikels contended, citing *Curtin*, that reversal of a theft conviction is always required if the defendant is found guilty of theft on the wrong theory. The court disagreed and stated "We interpret the *Curtin* dictum as meaning that there may be a technical error when the particular theory of theft upon which the jury is instructed turns out to be the wrong one. However, neither *Curtin* nor any decision cited therein actually holds there is a rule of per se reversal in such circumstances." (*Id*. at pp. 791-792.)

The decision in *Counts* relied in part on *People v. North* (1982) 131 Cal.App.3d 112, 117-118. In *North*, the court rejected the defendant's contention that his conviction for theft regarding the writing of worthless checks should be reversed because the jury was instructed on the wrong theory of theft. The *North* opinion holds that a theft conviction may be upheld as long as there is sufficient evidence of any theory of theft produced at trial. The opinion went on to hold that this rule applied even where the jury was not instructed regarding alternate theories of theft. (*Ibid*.)

In *Traster*, this division considered the appropriate remedy for a defendant convicted on a wrong theory of theft. There, the defendant's alleged wrongful acquisition of funds from his employers amounted to "larceny by trick," rather than theft by false pretenses, of which he was convicted. (*People v. Traster*, *supra*, 111 Cal.App.4th at p. 1389.) The court held that "the error in this case is merely a technical one in which the jury was instructed on a particular theory of theft which turned out to be the wrong one." (*Ibid*.) The court found that the conviction of theft by false pretenses required an additional element, corroboration, and determined that the error was harmless because the prosecutor had met the burden of proof. (*Id*. at pp. 1389-1390, citing *People v. Counts*, *supra*, 31 Cal.App.4th at p. 793.) The court then modified the judgment to reflect the convictions under a theory of theft by trick and device. (*Traster*, *supra*, at p. 1391.)

As discussed above, the two major differences in the two types of theft are (1) that theft by false pretenses occurs when a defendant obtains both title and possession of stolen items, while theft by trick and device requires only that the defendant take possession of the items, and (2) a conviction of theft by false pretenses requires corroborative evidence (*People v. Traster*, *supra*, 111 Cal.App.4th at pp. 1389-1390). To establish false pretenses, the People must show "1. The false pretense, or some note or memorandum thereof, is in a writing subscribed by the defendant or is in [his][her] handwriting; or [¶] 2. An oral false pretense is accompanied by a false token or writing; or [¶] 3. The false pretense is proved by the testimony of two witnesses or that of one witness and corroborating circumstances." (CALJIC No. 14.14.)

Defendant concedes that the evidence was sufficient to convict him on a theory of false pretenses. The first element was established. Defendant attempted to obtain money by cashing the checks, and Money Mart would have transferred title if the crime had been successful.

The second element of theft by false pretenses may be shown by any one of three alternatives set forth in CALJIC No. 14.14. The first alternative, a writing subscribed by defendant or in his handwriting is met because the fraudulent check had defendant's

name on it as the payee. The second alternative was also met because defendant fraudulently told Rowe that he had obtained the checks as payment for work completed, accompanied by a fraudulent "token or writing" in the form of a check. The third alternative was also satisfied when Rowe and Torres both testified as to defendant's presentation of a fraudulent check, and Gonzalez's testimony confirmed that the check was fraudulent.

It is true, as defendant points out, that in the instant case he was convicted of larceny in the form of theft by trick and device, rather than theft by false pretenses as in *Traster*. We find the difference to be of no significance, in that there was sufficient evidence here to prove the additional element of corroboration.

We agree with *People v. Traster*, *supra*, 111 Cal.App.4th at pp. 1389-1391 that technical errors do not necessarily require reversal. Defendant admits that there was sufficient evidence to convict him of theft by false pretenses and, under the rationale of *Traster*, no reversal is required.

B. *Admission of Testimony from Money Mart Tellers*

Defendant contends that the trial court erred in admitting Rowe's testimony that when she phoned Wescom, "they told me [the checks Mr. Hess was attempting to cash were] not okay" and Torres's testimony that when she phoned Wescom, "the bank told me that [the checks] were stolen."

1. Admission of Wescom Statements

The trial court allowed Torres to testify to her statement "only for the purpose of explaining her conduct and what she does after, but not for the truth of the matter whether it was stolen." The jury was instructed pursuant to CALJIC No. 2.09 that some evidence was received for a limited purpose. Defendant is correct that the trial court did not limit the statement by Rowe that the checks were "not okay." The trial court simply overruled the hearsay objection.

Defendant contends that even if the Wescom statements had been offered for a nonhearsay purpose, they had to be relevant to be admissible and were not. We agree that the statements, even if admitted for a nonhearsay purpose, had to be relevant. (Evid. Code, § 210.) They were relevant to explain the conduct of Rowe and Torres. Upon learning that the checks were "not okay," Rowe put a note in Money Mart's computer system alerting other stores to have defendant arrested if he tried to cash checks with them. When Torres learned the checks were "stolen," she called the police. The evidence thus was admissible to show why the tellers conducted themselves as they did and to establish a timeline of the events that occurred prior to defendant's arrest.

However, even assuming the statements by Wescom representatives were erroneously admitted for hearsay purposes, the question is whether the erroneous admission of the evidence resulted in a miscarriage of justice, that is, whether it is reasonably probable defendant would have been acquitted absent the evidence. (Evid. Code, § 353; *People v. Breverman* (1998) 19 Cal.4th 142, 172-173; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Defendant contends that the statements in question were highly inflammatory and the jurors almost assuredly considered the Wescom statement for the truth. The evidence was undisputed, however, that the checks were "not okay." The only question was whether defendant knew they were "not okay." The Wescom statements did not address this question.

There was evidence that defendant knew beforehand that the checks were "not okay" and intended to cash them with the intent to steal from Money Mart. Defendant told Rowe that the checks were payments for work he had completed. He later told Officer Wigmore that a friend had written the checks in front of him and had told him they were valid, and that he knew of Login and had called him to verify the check. He then testified that he had never done so. The statements from Wescom to Rowe and Torres were not critical in finding that defendant committed the crimes, thus the error is harmless. (See *People v. Lucero* (1998) 64 Cal.App.4th 1107, 1110-1111.)

2. Sixth Amendment Right of Confrontation

Defendant contends that the admission of the Wescom representatives' statements that the checks were "not okay" and "stolen" violated his Sixth Amendment right of confrontation.

In *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354 158 L.Ed.2d 177], the United States Supreme Court held that the Confrontation Clause applies where testimonial hearsay is involved; where nontestimonial hearsay is at issue, state hearsay laws apply. (*Id*. at p. 68; *People v. Cooper* (2007) 148 Cal.App.4th 731, 740-741.) While not defining testimonial hearsay, the court indicated that it includes statements "'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Crawford*, *supra*, at p. 52.)

In *People v. Cage* (2007) 40 Cal.4th 965, 987, the California Supreme Court analyzed the nature of "testimonial statements" in the context of a minor explaining to a doctor that his mother had slashed his face with a piece of glass. The court noted the focus of *Crawford* "is on formal and solemn accusatory statements made to *law enforcement agents* in the context of *criminal investigations or inquiries*," and the court held the statement to the doctor was admissible. (*Ibid*.) The doctor had asked the victim what happened to treat an injury and not to establish, for criminal purposes, that the victim was abused. The doctor's role was not investigatory and did not fall within the scope of *Crawford*. (*Id*. at p. 988.)

The same is true here. The challenged hearsay statements were not made in the course of a criminal investigation but were made for business purposes; Rowe and Torres were simply attempting to obtain information to prevent the theft of money from their employer. They were not acting as investigatory agents for law enforcement officials and the comments they obtained from Wescom employees certainly do not qualify as "testimonial statements" as envisioned by *Crawford*.

Even assuming that the trial court's admission of the Wescom statements was error under *Crawford*, the error was harmless. Applying the *Chapman*[2] standard to a Confrontational Clause violation, we consider several factors in determining whether reversal is appropriate, including "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case." (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 684 [106 S.Ct. 1431, 89 L.Ed.2d 674].)

The inclusion of the Wescom statements was not a significant part of the prosecutor's case. In fact, the statements were not even mentioned by the prosecutor during closing argument. Additionally, the Wescom statements were corroborated by Gonzalez's testimony regarding Login's account.

The theory of the case was that defendant was part of a scheme with Login and his friend Victor to obtain cash from Login's checking account that normally had a balance of less than $100 and into which a check in the amount of $4,880 had been deposited. The jury obviously believed that based upon defendant's inconsistencies in his testimony and dealings with Victor and Login, that he was part of the plan to cash checks that were the result of a fraudulently funded checking account in Login's name, an account that normally had a minimal amount of money in it. Under the circumstances, any error in admitting the comments of the Wescom representatives to whom Rowe and Torres spoke was harmless.

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[2] In *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705], the United States Supreme Court held that "before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

3. Evidence Code Section 352

We also reject defendant's challenge under Evidence Code section 352, which grants the trial court discretion to exclude evidence "if its probative value is substantially outweighed by the probability that its admission will . . . create substantial danger of undue prejudice . . . ." For purposes of Evidence Code section 352 analysis, unduly prejudicial evidence is that which "uniquely tends to evoke an emotional bias against defendant as an individual and which has very little effect on the issues." (*People v. Yu* (1983) 143 Cal.App.3d 358, 377.) Defendant has failed to convince us that the comments of the Wescom representatives were more prejudicial than probative.

C. *Sentencing Errors*

As defendant points out, the punishment for felony grand theft not involving a firearm is 16 months, two years, or three years in state prison. (§§ 18, 489, subd. (b).) The punishment for an attempt of that crime is one-half the term of imprisonment for commission of the crime. (§ 664, subd. (a).) Doubled as a second strike (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)), the sentence would be 16 months, two or three years, not the three years which the trial court imposed and doubled as a second strike.

The punishment for felony commercial burglary is 16 months, two years or three years in state prison (§§ 18, 461, subd. 2), doubled here as a second strike to two years and eight months, four years or six years. Since it is longer than the punishment for attempted grand theft, one of the commercial burglaries must provide the principal term of imprisonment, with the other two offenses providing the subordinate terms. (§ 1170.1, subd. (a).)

Additionally, section 654, subdivision (a), provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 precludes punishment for both burglary and attempted theft where the burglary is based on an entry with intent to commit that theft. (*People v. Alford* (2010) 180 Cal.App.4th

1463, 1468, petn. for review pending, petn. filed Feb. 19, 2010; *People v. Bernal* (1994) 22 Cal.App.4th 1455, 1458.)

Due to the foregoing sentencing errors, the case must be remanded for resentencing.

DISPOSITION

The judgment is modified to reflect defendant's conviction of attempted theft by false pretense. As so modified, the judgment of conviction is affirmed. The case is remanded for resentencing consistent with the principles expressed herein.

JACKSON, J.

We concur:

PERLUSS, P. J.

WOODS, J.